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No. 73-1143

In the Supreme Court of the United States

OCTOBER TERM, 1973

BOOKBINDERS LOCAL NO. 60, INTERNATIONAL BROTHERHOOD OF BOOKBINDERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 486 F. 2d 837. The decision and order of the National Labor Relations Board (Pet. App. B1-B48) are reported at 199 NLRB No. 35.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1973 (Pet. App. A1). The petition for a writ of certiorari was filed on January 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer did not violate Section 8(a)(1) and (3) of the National Labor Relations Act by locking out his employees and thereafter continuing operations with temporary replacements, in order to further his legitimate bargaining position.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page C1 of the petition.

STATEMENT

A. The Board's Findings of Fact

Inter-Collegiate Press operates a printing plant in Mission, Kansas where it prints and composes scholastic yearbooks and graduation announcements (Pet. App. B16; J.A. 127, 130, 200; J. Exh. 51).[1] The Company also prints samples and other promotional materials used by its salesmen, who sell its service on school campuses across the country and are in active competition with other printing companies for the business of this limited market (Pet. App. B17; J.A. 193-194, 198); and the Company furnishes yearbook editors with kits to assist them in preparing their copy (Pet. App. B17; J.A. 189). Since most of these products must be printed prior to May and June school graduations, the Company's

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[1] "J.A." refers to the joint appendix to the briefs in the court of appeals. "J. Exh.", "Co. Exh.", and "U. Exh." refer to the exhibits in the Board proceeding.

business is highly seasonal (Pet. App. B17; J.A. 145, 180, 181, 189). Thus, to meet its demanding production schedule and to honor its guarantees of delivery within 10 weeks of receipt of all copies, the Company augments its regular complement of 200 employees during its "busy season," which lasts from early February until late June (Pet. App. B17; J. A. 132, 89, 209).

Since February 1967, petitioner Union has been the certified bargaining representative of the Company's cover and bindery employees, and the employees who perform paper cutting, finishing, and packaging work in the announcement department (Pet. App. B 17-B18; J.A. 131; J. Exh. 51).[2] During the subsequent contract negotiations, the Union struck the Company for two weeks during August-September 1967, before agreement was reached on a contract for a term expiring on August 31, 1970 (Pet. App. B18; J.A. 224-226).

From July 7 to October 16, 1970, the parties met on 15 occasions in an unsuccessful effort to reach agreement on a new contract (Pet. App. B19; J.A. 227, 234; J. Exh. 51). On October 15, the Union rejected the Company's final proposal, which offered the Union terms and conditions superior to those in the expired contract and maintained the union-security clause in effect (Pet. App. B20; Co. Exhs. 68, 70, 71; J. Exh. 1). On that date a Federal Mediator stated that further bargaining was "an exercise in futility" (Pet. App. B20; Co. Exh. 71). The parties agreed that negotiations had reached a deadlock (Pet App. B20; J. A. 242; Co. Exhs. 72, 71). The Union did not indicate whether it would strike over its contract demands (Pet. App. B20; J.A. 102, 120, 242).

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[2]Other craft unions represent other units of the Company's employees (Pet. App. B18; J.A. 220, 154, 184).

After a bargaining session on October 16, the Company locked out its employees represented by the Union because "[i]t is imperative that the Company has a signed contract with your Union before the busy season" (Pet. App. B21; J.A. 87, 170-171; J. Exhs. 57, 8).[3] When the lockout failed to affect the Union's bargaining position, the Company, on November 9, 1970, offered to end the lockout without a contract if the Union would agree to a no-strike commitment (Pet. App. B22; J. A. 171, 185, 92-93, 208; J. Exh. 12; Co. Exh. 76). The Union, however, insisted that the Company agree to a contract acceptable to the Union by July 1, 1971, and no agreement on the Company's proposal was reached (Pet. App. B22-B23; J.A. 91-92, 106-107, 261, 97; J. Exhs. 13, 15; Co. Exh. 79).

Throughout the negotiations the Company received warnings from customers that any delay in meeting delivery dates would cause a change of printers, and Company salesmen advised the Company of mounting customer concern over the protracted negotiations (Pet. App. B25; J.A. 139, 137, 189-190; Co. Exhs. 27, 31). In order to avoid a permanent loss of business to competitors in an industry dependent upon repetitive patronage, the Company, on November 23, 1970, notified the Union that it would begin hiring temporary replacements for the locked out employees on November 30, in order to train them to meet the production demands of the 1971 busy season (Pet. App. B24-B25, B29; J.A. 125-126, 191, 210, 158, 160, 173; J. Exhs. 14, 17, 51). The Company resumed production on December 1, with temporary employees and continued to operate in that manner until June 1, 1971, when it ended the lockout

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[3]The Company first informed the Union of the possibility of a lockout during the September 16, 1970, bargaining session (Pet. App. B20; Co. Exh. 69). Between that meeting and the lockout, no agreement was reached on any unresolved bargaining issues (Pet. App. B20; Co. Exh. 72).

and reinstated the 66 locked-out employees (Pet. App. B24, B26, B27; J.A. 125-126, 191, 210, 158, 160; J. Exhs. 39, 40 51; U. Exh. 29).158, 160; J. Exhs. 39, 40, 51; U. Exh. 19).[4] Subsequently, during the 1972 busy season, the parties reached agreement on a contract.

B. The Decisions Below

The Board (with two Members dissenting), following its earlier decision in *Ottawa Silicia Co.*, 197 NLRB No. 53, held that the Company's lockout and use of temporary replacements did not violate Section 8(a)(1) and (3) of the Act, and accordingly dismissed that portion of the complaint (Pet. App. B1-B9).[5] Two Members of the Board majority found the Company's conduct permissible because "absent antiunion motivation, which is not shown here, an employer does not violate Section 8(a)(3) or 8(a)(1) of the Act by hiring temporary replacements to continue operations during an otherwise lawful lockout" (Pet. App. B2). Chairman Miller agreed that the conduct was permissible in the circumstances here because the Company "made abundantly clear throughout that the replacements were to be used for the duration of the labor dispute only" (Pet. App. B6), and "the entire course of events * * * evidences that [the Company's] only purpose was to attempt to retain its competitive position, which it felt would be seriously jeopardized by the economic effects of a strike during a crucial production period" (Pet. App. B7).

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[4]Fifteen of the locked-out employees failed to report to work on June 1 (Pet. App. B27; J. Exh. 43). Thereafter, the Company sought to hire permanent employees for these positions, and eventually filled them with fifteen of the temporary employees hired during the lockout (Pet. App. B26; J. Exhs. 44, 45).

[5]The Board affirmed the Examiner's dismissal of other allegations of the complaint not contested here.

The court of appeals sustained the Board's dismissal of the complaint. It held on review of the record that "[t]he evidence clearly indicates that the employer's use of the temporary replacements was motivated only by legitimate and substantial business reasons" (Pet. App. A9), and that there was "no showing that the Union's position as bargaining agent was jeopardized or that it has suffered any dimunition in its capacity to effectively represent the employees in the bargaining unit" (Pet. App. A12). The court concluded that the Board had properly balanced the 'conflicting legitimate interests' * * * in this case' (Pet. App. A16).

ARGUMENT

The basic question presented--whether an employer violates the National Labor Relations Act by locking out his employees and then resuming operations with temporary replacements, where he is motivated by legitimate business considerations--is the same issue which was presented, in essentially the same factual setting, in *Cylinder Gas, etc. Employees Local No. 283* v. *Ottawa Silica Co. and National Labor Relations Board,* No. 73-807, certiorari denied, February 19, 1974.[6] Moreover, the reasons advanced for granting the present petition are essentially the same as those advanced in the petition in No. 73-807. Accordingly, the considerations which prompted the Court to deny the petition in No. 73-807 are equally applicable here.

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[6]The Board relied on its decision in *Ottawa Silica* in deciding the present case (*supra*, p. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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